

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

KATHLEEN KLINE

APPELLANT,

**v.
CITY OF KANSAS CITY, MISSOURI**

RESPONDENT.

DOCKET NUMBER WD72208
DATE: February 15, 2011

Appeal From:

Jackson County Circuit Court
The Honorable Peggy Stevens McGraw, Judge

Appellate Judges:

Division Three: Cynthia L. Martin, Presiding Judge, Gary D. Witt, Judge, and Zel M. Fischer,
Special Judge

Attorneys:

Karen K. Howard and Joseph H. DeCuyper, Jr., Kansas City, MO, for appellant.

Saskia C.M. Jacobse and Jamie L. Cook, Kansas City, MO, for respondent.

MISSOURI APPELLATE COURT OPINION SUMMARY

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Before Division Three Judges: Cynthia L. Martin, Presiding Judge, Gary D. Witt, Judge, and Zel M. Fischer, Special Judge

From 1977 to 2006, Kathleen Kline was employed as a firefighter with the Kansas City Fire Department (“Department”). In 2007, Kline filed the instant lawsuit against the City, which alleged two claims pursuant to the Missouri Human Rights Act (“MHRA”).

In Count One, Kline alleged that the City discriminated against her based upon her sex in violation of Section 213.055. Specifically, Kline alleged that the “fire stations to which Kline was assigned to and sent to for business reasons did not have equal and/or comparable facilities as Defendant provided to its male Fire Department employees” and contended that the City was required by law to provide separate facilities “for women to wash and dress.” Kline further alleged that the City discriminated against her based on her sex as it pertained to her July 2006 request to trade posts with another Battalion Chief whose station had female facilities.

In Count Two, Kline alleged that the City unlawfully retaliated against her pursuant to Section 213.070 because Kline had initiated previous litigation against the City. Because she engaged in these protected activities, Kline alleged that she was “subjected to adverse actions by Defendant to wit: (a) Defendant never remedied Kline’s unequal facilities and she was subjected to discriminating working conditions, (b) Plaintiff made a request for a trade which was denied by Chief Dyer, and (c) Defendant engaged in retaliatory discipline of Kline.”

These claims were tried before a jury. The jury returned a verdict in favor of the City on both counts. Kline now appeals, bringing seven Points.

AFFIRMED.

Division Three holds:

Kline brings six Points that allege the trial court erred in denying her motion for new trial. In Point One, Kline argues that the trial court erred because the trial court should have prevented the City’s witnesses from testifying “to facts which [the City] did not disclose prior to trial” in violation of applicable discovery rules. A trial judge has wide latitude in ruling on whether to admit or exclude evidence. On appeal, Kline focuses on two specific examples

wherein she alleges the City presented “new evidence” at trial that should have been previously disclosed during discovery, but both of these instances merely involved a witness providing inconsistent testimony at trial. Inconsistent trial testimony by witnesses occurs routinely at trial, and Kline cites no authority to support the proposition that such an inconsistency somehow rises to the level of a *discovery violation*. Point One is denied.

In Point Two, Kline argues that the trial court erred in denying her motion for new trial because the “trial court’s decision to permit evidence of station construction which occurred after 8/31/06 was not relevant in that Appellant had retired and her claim for damages predated 8/31/06,” and “this evidence misled the jury to erroneously believe any construction of stations, no matter when it occurred absolved [the City] of liability.” It is not disputed that the jury heard evidence, without objection, pertaining to the same issues. A party cannot be prejudiced by the admission of allegedly inadmissible evidence if the challenged evidence is merely cumulative to other evidence admitted without objection. We therefore deny Kline’s second Point.

In Point Three, Kline argues that the trial court erred in denying her motion for new trial “because the trial court’s decision to exclude Appellant’s evidence of three incidents of retaliation by [the City] against [Kline] was an abuse of discretion in that the evidence was relevant, material and probative” to prove that the City had “retaliatory animus towards” Kline. A trial court has considerable discretion in deciding whether to admit or exclude evidence at trial. At trial, Kline sought to prove that the City’s challenged conduct (refusing Kline’s trade request and the City’s failure to update female facilities in the stations) was based on discrimination. Kline made three offers of proof of the evidence that the trial court refused to admit into evidence. We cannot conclude that the trial court abused its considerable discretion in determining that the evidence in question was not probative of any material issue to be determined by the jury. Point Three is denied.

In Point Four, Kline argues that the trial court erred in denying Kline’s motion for new trial because the trial court refused to allow counsel to read Section 292.150 and Section 292.160 RSMo to the jury. Kline fails to cite any authority for the proposition that counsel had a right to read state statutes to the jury, and for good reason because such is not the law in Missouri. The courts of this state have held reading a statute to the jury is improper. In Missouri, the jury is to obtain the law only from approved jury instructions. Point Four is denied.

In Point Five, Kline claims that the trial court erred in denying her motion for new trial “because the trial court’s decision to submit jury instruction nos. 8 and 13 was erroneous in that these instructions were improper affirmative converse instructions.” Specifically, the only properly preserved argument by Kline contends that “the instructions are erroneous because they included unnecessary evidentiary details instead of ultimate issues, which favored [the City].” A proper instruction submits, not evidentiary details, but only the ultimate facts, to avoid undue emphasis of certain evidence, confusion, and the danger of favoring one party over another. In arguing that the instructions contained “unnecessary evidentiary detail,” Kline did not at trial, and has not before this Court, suggest any “facts” that should have been struck by the trial court prior to the instructions being submitted to the jury. Kline does not highlight any specific verbiage from either instruction that was somehow prejudicial because it was too detailed or misleading in this regard. Without further elaboration by counsel, we are at a total loss as to

what Kline's argument is as it pertains to "unnecessary evidentiary detail" in these instructions. Point Five is denied.

In Point Six, Kline asserts that the trial court erred in denying her motion for new trial "because the cumulative effect of the evidentiary errors . . . resulted in substantial prejudice and manifest injustice to appellant in that appellant was deprived of a fair trial." An appellate court may grant a new trial based on the cumulative effects of errors, even without a specific finding that any single error would constitute grounds for a new trial. However, relief will not be granted for cumulative error when there is no showing that prejudice resulted from any rulings of the trial court. Because Kline has failed to persuasively identify any error during the trial, the point must fail. Point Six is denied.

Kline's seventh and last Point alleges that the "trial court erred in denying appellant's motion for judgment notwithstanding the verdict because appellant presented substantial uncontroverted evidence to prove appellant's claims as to unequal facilities and denial of the appellant's trade request." The standard of review for the denial of a judgment notwithstanding the verdict (JNOV) is essentially the same as review of the denial of a motion for directed verdict. A directed verdict is not given in favor of the party having the burden of proof no matter how overwhelming that party's evidence may be or how minuscule the other party's evidence may be; a directed verdict in favor of the party having the burden of proof (usually the plaintiff) is never based upon the plaintiff's evidence. This is in recognition of the fact that the defendant, who has the benefit of the burden of proof, is entitled to try the case with no evidence at all and to rely solely upon the jury disbelieving the plaintiff's evidence. Because she bore the burden of proof, Kline's evidence alone was not a basis for a directed verdict, yet this is all she focuses on in arguing that the trial court erred in denying her motion for judgment notwithstanding the verdict. We must reject this Point because Kline has failed to even attempt to demonstrate how the City has admitted in its pleadings, by counsel, or through the defendant's individual testimony the basic facts of the plaintiff's case. Point seven is denied.

The judgment of the trial court is hereby affirmed.

Opinion by: Gary D. Witt, Judge

February 15, 2011

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